IN THE

Supreme Court of the United States

October Term, 1976

No. 76-2161

JOSEPH ANTHONY CORDOVA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner Joseph Anthony Cordova respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 22, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Arizona.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 22, 1976. A timely petition for rehearing en banc was denied on July 20, 1976, and this petition for certiorari was filed within 30 days of that

date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where defendant's right to a speedy trial at the state level has been violated and the case dismissed with prejudice, has jeopardy attached for purposes of application of the Double Jeopardy Clause of the United States Constitution?

2. Does a dismissal with prejudice for violation of a State's speedy trial rule bar subsequent prosecution by the United States of America for the same offense?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 21:

§ 841(a)(1) and (b) Possession with intent to distribute a schedule 1 narcotic controlled substance.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Arizona Revised Statutes (A.R.S.) Title 11.

§ 36-1002.01 Possession of narcotic drugs for sale; penalty; probation or suspension of sentence prohibited.

(a) Except as otherwise provided in this article every person who possesses for sale any narcotic drug other than

marijuana shall be punished by imprisonment in the state prison for not less than five years nor more than fifteen years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison.

A.R.S. Title 17 Rule 8.6(a)(b):

(a) Defendant in Custody. If a defendant in custody is not brought to trial within the time limits prescribed by Rule 8.2(b), he shall be released on his own recognizance without delay, and the time limit prescribed by Rule 8.2(c) shall apply.

(b) Other Violations. If the court determines after considering the exclusions of Rule 8.4, that a time limit established by Rules 8.2(a), 8.2(c), 8.2(d), 8.3(a), 8.3(b)(2), or 8.3(b)(3) has been violated, it may on motion of the defendant, or on its own initiative, dismiss the prosecution with prejudice.

STATEMENT OF THE CASE

On November 2, 1973, the petitioner Cordova was arrested in Phoenix, Arizona, and charged under A.R.S. § 36-1002.10 with possession of heroin with intent to distribute.

On July 15, 1974, the charge against Cordova was dismissed with prejudice on the grounds of denial of a speedy trial pursuant to Rule 8.6(b), Arizona Rules of Criminal Procedure. On October 10, 1974, the Supreme Court of Arizona let stand the lower court order dismissing the charge with prejudice.

On January 22, 1975, the Federal Grand Jury for the district of Arizona indicted petitioner Cordova for possession

of heroin with intent to distribute, pursuant to 21 U.S.C. § 841(a)(1) and (b) Possession with intent to distribute a schedule I narcotic controlled substance.

Petitioner was tried in the United States District Court, for the District of Arizona on December 9, 1975. He was convicted and sentenced to twelve years imprisonment and a Ten Thousand Dollars fine and a special three year parole term.

Petitioner appealed the judgment and conviction of the District Court to the United States Court of Appeals for the Ninth Circuit. In a per curiam opinion the conviction was affirmed on June 22, 1976.

REASONS FOR GRANTING THE WRIT

1. THE PETITION RAISES A PRACTICAL ISSUE OF WHAT CONSTITUTES JEOPARDY.

The Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States applies to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784. In cases where the first prosecution was at the State level the Court must first determine if the petitioner was ever placed in jeopardy. In determining if jeopardy attached in the first prosecution will the Court apply the prosecuting State's local definition of when jeopardy attaches, or will the Court make an independent determination of the issue?

The petitioner was held for trial in Arizona on November 2, 1973, on charges of possession of heroin with intent to distribute. On July 15, 1974, the charge was dismissed with prejudice on the grounds that petitioner was denied a speedy trial under Arizona law. On October 10, 1974, the Supreme

Court of Arizona affirmed the trial Court's dismissal with prejudice in a special action brought by the State of Arizona appealing the trial court's ruling. Petitioner was released and cannot again be prosecuted on that indictment in the State of Arizona.

Despite the fact that the dismissal with prejudice constituted jeopardy under the ruling of the Supreme Court of Arizona, the United States Court of Appeals for the Ninth Circuit in its opinion of June 22, 1976, stated "the proceeding in State Court did not place him in jeopardy. *See United States v. Crosson*, 464 F.2d 96, 103 (9th Cir. 1972)."

The question of when a person is in legal jeopardy has been answered numerous times, but with wide variation among the States. Many courts have held that jeopardy attaches in a jury trial when the jury is selected and sworn. *Allen v. State*, 52 Fla. 1, 41 So. 593; *Huey v. State*, 88 Tex. Crim. 377, 277 S.W. 186; *McDonald v. State*, 79 Wis. 651, 48 N.W. 863.

The charges against the petitioner were dismissed with prejudice before a jury was ever chosen. Petitioner was released for failure to bring him to trial within a specified time. In Arizona and in other States, failure to bring a prisoner speedily to trial may result in a discharge that is a legal equivalent of an acquittal and is a bar to further proceedings at the State level. 21 Am. Jur. 2d *Criminal Law* § 178. Yet there are States which do not follow this rule.

This becomes an issue in Constitutional challenges to successive State and Federal prosecutions where the Court must determine if jeopardy attached at the first proceeding. Specifically, does the Supreme Court of the United

States recognize a dismissal for failure to bring a prisoner speedily to trial as being jeopardy in every jurisdiction, or does it defer to the rule of the particular State wherein the first prosecution took place?

This question is one of importance given the rule of *Benton v. Maryland*, 395 U.S. 784. Constitutional challenges to State violations of the Double Jeopardy Clause of the Fifth Amendment will be brought to the Court from jurisdictions which have conflicting definitions of what constitutes jeopardy. The Court should clarify the definition of jeopardy which will apply in such cases.

2. THE DECISION BELOW IGNORES DEVELOPMENTS IN THE LAW OF DOUBLE JEOPARDY AFTER *BARTKUS V. ILLINOIS*.

The opinion of the Ninth Circuit stated bluntly that successive State and Federal prosecutions "do not violate the proscription of double jeopardy included in the Fifth Amendment." The Court based its holding on *Bartkus v. Illinois*, U.S. 121, at 132-33.

Benton v. Maryland, 395 U.S. 784 overruled *Palko v. Conn*, 302 U.S. 319, the decision upon which *Bartkus* was based. Petitioner's appeal raises questions as to the efficacy of *Bartkus* which were not reached by the Ninth Circuit's opinion.

The *Bartkus* decision was a logical outgrowth of an approach to Constitutional adjudication formulated in *Palko*. The *Palko* decision stood for the Constitutional principle that "only when a kind of jeopardy subjected a defendant to hardship so acute and shocking that our policy will not endure it, did the Fourteenth Amendment apply." 395 U.S. at 793.

The Court in *Bartkus* approached the question of whether successive State and Federal prosecution constituted Double Jeopardy by considering whether in the light of precedent, reason and experience such prosecutions were offensive to the concept of ordered liberty represented by the Due Process Clause of the Fourteenth Amendment. The Court undertook an exhaustive historical review of the entire body of Constitutional adjudication on this issue and concluded that "the standards of outlawry which offended the conception of Due Process outlined in *Palko*, had not been breached by successive prosecution of *Bartkus* by the Federal government and the State of Illinois, 395 U.S. at 131.

Benton v. Maryland overruled *Palko* and created a new approach to Constitutional adjudication. The Court held that it would no longer analyze the facts in order to determine if the *Palko* test had been violated. The reasoning of *Bartkus* on the major Constitutional issue of whether successive State and Federal prosecutions are permissible under the Fifth Amendment is no longer satisfactory. There is great need at the present time for the Court to detail the parameters of the Jeopardy Provision of the Fifth Amendment as concerns successive State and Federal prosecution.

The petitioner's appeal presents the Court with a ripe vehicle for resolution of that substantial Constitutional issue in the light of *Benton v. Maryland's* effect on the *Bartkus* decision.

3. THE PETITION RAISES SUBSTANTIAL NEW QUESTIONS CONCERNING THE APPLICATION OF THE DUAL SOVEREIGNTY DOCTRINE TO SUCCESSIVE STATE AND FEDERAL PROSECUTIONS FOR THE SAME NARCOTICS OFFENSE.

As early as 1852, the case of *Moore v. Illinois*, 14 How. 13, the Court enunciated the principle that successive prosecutions by State and Federal authorities of the same offense do not constitute Double Jeopardy because the defendant is liable to punishment in each sovereighnty.

The rule was stated by the Court in *Moore* at 14 How. 19-20 as follows:

> But admitting that the plaintiff in error may be liable to an action under the act of Congress for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. An offense in its legal signification, means the transgression of a law. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the Marshall of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault or murder, and subject the same person to a punishment under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable.

In *United States v. Lanza*, 260 U.S. 377, the Court applied the 'Dual Sovereignty' doctrine to successive prosecutions for possession of liquor in violation of the laws of the State of Washington and the National Prohibition Act.

The Court ruled

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same Territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. 260 U.S. at 382.

This rule has been affirmed numerous times since *Lanza*. See *Bartkus v. Illinois*, 359 U.S. at 132, fn. 20.

Despite the fact that the law is settled as to this question, this petition brings before the Court additional facts which require a renewed interpretation of the limits to which the Dual Sovereignty rule currently extends.

The investigation and prosecution of narcotics offenses is no longer a separate State and Federal undertaking. Local, State, and Federal officials are necessarily working together to limit the traffic of narcotics into and among the various States. Because of the fluid nature of narcotics commerce, effective law enforcement in the field requires national and international cooperation.

The cooperative investigations have resulted in duplicate prosecutions by State and Federal authorities in cases such as the petitioner's. The evidence presented at the petitioner's trial by the prosecution was the result of investigative work by both State and Federal officials.

This duality of effort in the investigative and prosecution of narcotics offenses raises an issue as to the degree to which the Dual Sovereignty rule applies in the modern world of narcotics law enforcement. National sharing of information through the use of computer terminals, and other modern technology, has unified State and Federal investigation and prosecution of narcotics offenses. The Federal Courts are faced in many instances with second prosecutions of the same offense, using the same evidence as was persented in a prior State prosecution. This duplication of prosecutions adds to the Federal Court's heavy calendar the burden of hearing a case that has already been tried fully and adequately at the State level.

The opinion of the Ninth Circuit did not reach any of these practical considerations and review by the Supreme Court would be appropriate at this time when successive prosecutions of narcotics cases at the State and Federal level are becoming more common.

CONCLUSION

For the foregoing reasons the petition for Writ of Certiorari should be granted.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOSEPH ANTHONY CORDOVA, *Defendant-Appellant.*	No. 76-1183 OPINION

[June 22, 1976]

Appeal from the United States District Court
for the District of Arizona

Before: WRIGHT, KILKENNY and SNEED, Circuit Judges.

PER CURIAM:

Cordova was convicted after jury trial of possession of heroin with intent to distribute [21 U.S.C. § 841(a)]. We affirm.

Cordova raises four issues which merit discussion: (1) validity of the search; (2) double jeopardy; (3) speedy trial; and (4) testimony by a prosecution witness concerning Cordova's past criminal conduct, unrelated to the crime charged.

Heroin and other evidence was seized from the home of Ms. Klase, who later became a government witness. Cordova has no "automatic" or "actual" standing to object to the seizure of any item, as he did not at the suppression hearing assert a possessory interest in any, and the government's case does not depend on proof of his possession at the time of the search. *See Brown v. United States,* 411 U.S. 223, 228-29 (1973); *United States v. Boston,* 510 F.2d 35 (9th Cir. 1974).

Cordova's double jeopardy argument lacks merit. After his arrest he was prosecuted first by the state of Arizona. That action was dismissed before trial for failure to comply with the state's speedy trial rule. The proceeding in state court did not place him

in jeopardy. *See United States v. Crosson,* 462 F.2d 96, 103 (9th Cir. 1972).

But we need not reach that question since successive state and federal prosecutions "[do] not violate the proscription of double jeopardy included in the Fifth Amendment." *Bartkus v. Illinois,* 359 U.S. 121, 132-33 (1953). *See also Crosson, supra.*

We turn to the speedy trial issue. Cordova argues that a lapse of 14 months from the date of arrest by Phoenix police (November 2, 1973) to the date of his federal indictment (January 22, 1975) constituted a denial of his Sixth Amendment right to a speedy trial.[1]

Cordova's speedy trial right under the Sixth Amendment was not activated until the date of federal "accusation." *United States v. Marion,* 404 U.S. 307, 313 (1971). That is the date on which a defendant is arrested and held to answer on a criminal charge, or the date on which he is formally charged, whichever is earlier. *Marion,* 404 U.S. at 320. *See also Dillingham v. United States,* 423 U.S. 64 (1975).

Cordova was not arrested by federal authorities or held to answer on the charge now before us before the date of federal indictment. Since the federal prosecution did not start until January 22, 1975, Cordova's Sixth Amendment rights were not activated until that date. *Marion,* 404 U.S. at 313.

The fact of Cordova's arrest in November by state officers is irrelevant to the issue before us because that arrest was for alleged violation of Arizona, not federal, law. *See Gravitt v.*

[1]Cordova was tried and convicted on December 9, 1975. He does not argue that there has been a violation of the Speedy Trial Act [18 U.S.C. §§ 3161 *et seq.*]. Nor can he. Sanctions under Section 3162, imposed for violation of Section 3161(b) & (c), are not applicable until June 30, 1979. *See* Section 3163; *United States v. Tirasso,* ___ F.2d ___, ___ n.1 (9th Cir. Mar. 25, 1976). Section 3164 was not effective until September 29, 1975. *Id.* Section 3164(b) provides that for any person incarcerated before the effective date of Section 3164, trial "shall commence no later than ninety days following the first day of the interim period." In the instant case, Cordova's trial date (December 9, 1975) is clearly within 90 days of September 29. There was no Speedy Trial Act violation.

United States, 523 F.2d 1211, 1215 n.6 (5th Cir. 1975); *United States v. Lemons,* 470 F.2d 135, 137 (3rd Cir. 1972); *United States v. DeTienne,* 468 F.2d 151, 155 (7th Cir. 1972).

Nor can Cordova benefit from the coincidence that the state prosecution following the November arrest was for the same illegal activity as that involved in the federal prosecution. As we have discussed, separate sovereignty allows both prosecutions. There is no indication that the state arrest and prosecution constituted "a mere 'temporary device' used to restrain appellant" until federal authorities might choose to prosecute. *United States v. Cabral,* 475 F.2d 715, 718 (1st Cir. 1973). *See also DeTienne, supra,* 468 F.2d at 155.[2]

Cordova's allegation of pre-accusation delay must, then, be based upon the due process clause of the Fifth Amendment, not the speedy trial clause of the Sixth Amendment. *Marion,* 404 U.S. at 324. If so, the standards in *Barker v. Wingo,* 407 U.S. 514 (1972), do not apply here. Cordova can prevail only by demonstrating that the 14-month delay caused substantial, actual prejudice and was an intentional device on the part of the government to gain tactical advantage. *Marion,* 404 U.S. at 324; *United States v. Andros,* 484 F.2d 531, 533 (9th Cir. 1973). He made no such showing below and we must reject his speedy trial argument.

[2]In *Reese v. United States Board of Parole,* 530 F.2d 231 (9th Cir. 1976), a divided panel of this court held that the due process requirements of *Morrissey v. Brewer,* 408 U.S. 471 (1972), were not invoked merely because federal authorities had lodged a detainer against a federal parolee then held in state prison. Dissenting Judge Duniway focused on the fact that

> "a detainer, when lodged, puts the detainee in the joint custody of the prison authority and of the person or body issuing the warrant which is the basis for the detainer. *Braden v. 30th Judicial Circuit Court of Kentucky,* 1973, 410 U.S. 484, 489 n.9. . . ."

Id. at 238.

In this case, Cordova was prosecuted by the state with no exercise of control over defendant by the federal government. Not until some time after the state prosecution was dismissed did the federal government take control by means of indictment.

We next face a question raised by testimony of Klase concerning past criminal activity of Cordova, unrelated to the crime charged. Relevant portions are set forth in the margin.[3]

[3]"Q. Did you ever find out what kind of business he was in?
A. At first, no; I did not. He just said that he worked for his father. He was in land management and that's all I believed. That's what I took, was what he told me.
Q. Did you ever find out what he really did?
A. Later in years.
Q. About how much later?
A. Oh, about three, two or three years later, I found out, and this is what made me decide to do what I did.
Q. Well, what did you find out that he did?
A. Well, at first he started taking care of a lot of hot items, stolen items, would sell them.
MR. WOLFRAM: If it please the Court, I must object. This is, first of all, totally irrelevant and, secondly, highly prejudicial.
THE COURT: All right, just testify as to the merits of this case, nothing extraneous.
THE WITNESS: Okay.

• • •

Q. Did you ever sell heroin on the street?
A. No, I did not.
Q. Did you ever make a delivery?
A. At one time, yea.
Q. Do you recall when that was and how much it was?
A. I don't remember how much, maybe ten to fifteen papers. I don't recall. I can't remember. It wasn't a great amount. I do remember that. He was gone for the weekend. Later, I found out he was serving probation time in jail is how I found out why he was gone on the weekend.
MR. WOLFRAM: If it please the Court, at this time, since the witness has been previously instructed, I would move for a mistrial.
THE COURT: Objection is overruled. Proceed. Just keep your testimony down to this case.
THE WITNESS: All right, I am sorry.

• • •

A. Like I said, I found out that he was married. I found out what his real name was, who he really was.
Q. How did you find all this out, by the way?
A. Because in—a few months before that, prior, he was busted.
Q. Well, we don't—just talk about—you say you found out.
MR. WOLFRAM: If it please the Court, I would renew my motion for a mistrial at this time.
THE COURT: Overruled.
MR. WOLFRAM: If it please the Court, I would request that the jury be instructed that any of these things may tend to somehow imply to them other matters not material to this case, that they put those matters out of their minds.
THE COURT: Yes, anything that has to do with any inference that might be alluded to, of any other type of involvement against the law, you are to exclude that completely. We are not concerned with anything else, other than this particular charge here and there is no evidence of any other crimes having been committed and so, if you would just—the witness, I am directing this to the witness, just testify now as to just this particular charge here, the heroin, and don't bring anything else in about anything other, because we are not concerned with that.
THE WITNESS: Okay."
[C.T. 18-19; 26-27; 31-32.]

Cordova did not testify and Klase's testimony was clearly inadmissible. *See Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *Lyda v. United States*, 321 F.2d 788, 795-96 (9th Cir. 1963). However, we believe that exposing the jury to it was harmless error within the meaning of Fed. R. Crim. P. 52(a). *See Chapman v. California*, 386 U.S. 18 (1967). *See also Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

First, the offending remarks came from the mouth of an unresponsive witness and were not invited by the prosecution. *Contrast Lyda, supra*, 321 F.2d at 795. *Cf. Ailsworth v. United States*, 448 F.2d 439, 441 (9th Cir. 1971). Second, the evidence of Cordova's guilt was overwhelming. *Contrast Lyda, supra*, 321 F.2d at 796. Third, the trial judge gave prompt corrective instructions. *Donnelly, supra*, 416 U.S. at 644. While defense counsel properly and promptly objected to the volunteered and unresponsive answer in each instance, those objections and motions for mistrial do not, in the context of the entire trial, mandate reversal.

Appellant's other contentions are without merit.

AFFIRMED.

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